Filed 5/7/12 P. v. Valencia CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. AUDON VALENCIA, Defendant and Appellant.	B226425 (Los Angeles County Super. Ct. No. BA359344)

APPEAL from a judgment of the Superior Court of Los Angeles County, Anne H. Egerton and Norm Shapiro, Judges. Affirmed.

Michael Ian Garey for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr. and Baine P. Kerr, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Audon Valencia appeals from the judgment entered following his no contest plea to the sale of methamphetamine, possession of methamphetamine for sale, receipt of proceeds derived from controlled substance offenses, and child abuse, entered after his suppression and related motions were denied. The trial court sentenced Valencia to a term of five years in prison.

After witnessing what they believed to be a narcotics transaction, Pomona Police officers made a warrantless entry into a residence located on Waters Avenue in Pomona; conducted a warrantless canine search of the interior of Valencia's Ford Explorer, which was parked in the driveway of the Waters Avenue home; and conducted a brief, warrantless entry to secure a residence located at Marble Lane in La Habra, where they observed methamphetamine in plain view inside the house. The lead officer then sought and obtained a search warrant for a full search of the Marble Lane address. The warrant affidavit included information provided by a confidential informant and was sealed pursuant to *People v. Hobbs* (1994) 7 Cal.4th 948 (*Hobbs*). It also included, in support of the probable cause showing, observations made during the preceding warrantless searches. Officers executed the warrant and seized, inter alia, large amounts of methamphetamine and United States currency from the Marble Lane house.

Upon Valencia's motion, most, but not all, of the four-page warrant affidavit was unsealed. Valencia challenged the legality of the searches via a motion to quash, traverse, and suppress heard at the preliminary hearing; a motion to set aside the information pursuant to Penal Code section 995; and a renewed motion to suppress brought in the trial court. Both the preliminary hearing court and the trial court concluded the searches of the Waters residence, the Explorer, and the initial warrantless entry at Marble Lane violated the Fourth Amendment. Both courts nonetheless found the subsequent search of Marble Lane pursuant to the warrant valid under the independent source doctrine, and declined to suppress evidence.

Valencia contends that his motions to quash and traverse the search warrant, suppress evidence, set aside the information, and unseal the warrant affidavit in its entirety, should have been granted. In conjunction with these arguments, he requests that we review the sealed transcript of the in camera hearing and the sealed portion of the warrant affidavit. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*[1]

a. *Surveillance of Valencia in April and June 2009.*

In the spring of 2009, Pomona Police officers were investigating what they believed to be a drug-trafficking operation involving Valencia and others. On April 9, 2009, Officer David Estrada and his team conducted surveillance of a residence located on Olive Street in the City of Pomona. Officers also spent several hours watching Valencia's Ford Explorer. They followed Valencia when he travelled to Olive Street and continued on to Anaheim. During this period, Valencia engaged in "counter[-] surveillance driving," maneuvers designed to detect the presence of law enforcement officers. Estrada explained: "On numerous occasions throughout that surveillance, [Valencia] would drive indirect routes, drive through parking lots, park, stop momentarily, and continue through the parking lot. He would also drive . . . in a northbound direction, conduct U-turns when [it] wasn't needed to be done."

On April 13, 2009, Estrada observed Valencia driving the Explorer outside the same residence on Olive Street. Valencia's mother-in-law, Edilmera Zagrera, exited the residence and approached the Explorer. She opened the Explorer's rear door, spoke to Valencia, placed an item under her shirt, and immediately reentered the residence. Valencia again engaged in counter-surveillance driving.

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[1] Because Valencia pleaded no contest before trial, we glean the facts from the evidence adduced at the preliminary hearing and at a subsequent evidentiary hearing on his renewed motion to suppress.

On April 17 and June 23, 2009, Estrada observed Valencia near a residence located on Marble Lane in La Habra. Valencia again engaged in counter-surveillance driving. Between April 17, 2009 and July 22, 2009, Estrada observed Valencia entering or exiting the Marble Lane residence four times; the only other persons seen coming and going from the house were Valencia's wife and child.

b. *Events of July 22, 2009.*

(i) *Suspected transaction on Angela Street and discovery of methamphetamine in the Camry.*

On July 22, 2009, Estrada and six other officers conducted surveillance at the Marble Lane residence. The Explorer was parked in the driveway. At sometime around or after noon, Valencia left in the Explorer, accompanied by a woman and an infant, apparently his wife and child. He drove to a Food 4 Less supermarket in Pomona, approximately one-half hour's drive away. The trio entered the market and returned to the Explorer after approximately 10 minutes. The woman and child reentered the car, but Valencia remained outside talking on his cellular telephone. He scanned the parking lot, "looking [in] a 360-degree angle." He walked in a southwesterly direction, hung up the phone, returned to the Explorer, got inside, drove for approximately 150 feet, and parked in a different parking space. A white Toyota Camry entered the parking lot. Valencia and the driver of the Camry appeared to make eye contact.

The two vehicles left in tandem, one following the other. They drove to Angela Street, a cul-de-sac, via an indirect route. Both cars made U-turns in the cul-de-sac and parked along the curb, one directly behind the other. The cul-de-sac was two blocks away from the Olive Street residence. Estrada found this significant because drug traffickers tend to conduct transactions in familiar locales.

The cars remained in the cul-de-sac briefly, and then the Explorer departed. The officers did not see any transaction between the drivers, and did not see anyone exit either car. However, the vehicles had been out of the sight of all officers for between one to three minutes. Officer Richard Machado observed the Camry still parked on Angela while the Explorer was driving away. Both the Camry's driver, Gilberto Lopez, and his

adult female passenger, Maria Mendoza, had their hands in the vehicle's center console area. Both looked startled when they noticed Machado driving by.

The Camry left Angela Street and travelled to the 71 Freeway. Officer Richard Aguiar followed and made a traffic stop within 10 minutes. Aguiar searched the Camry and recovered two clear, Ziploc baggies, each containing approximately one pound of methamphetamine, from the center console.[2] The driver was arrested; the passenger was detained. Both were taken to the police station.

(ii) *Valencia's arrest and searches at the Waters Avenue residence*.

Within 15 minutes of the Camry stop, officers located the Explorer in the driveway of a residence on Waters Street in Pomona, about a half mile from the cul-de-sac. Estrada had obtained information from an unidentified source that "there may be drugs" at the residence. He, along with Officer Machado and four to five other officers, knocked on the door. A 12-year-old girl answered. Estrada asked whether her parents were home. She responded affirmatively and opened the door; officers entered the residence. Valencia was seated on a couch, and Estrada arrested him. Zagrera, who was also present, subsequently signed a consent-to-search form. A search of the residence revealed no contraband.

Estrada removed a key to the Explorer from Valencia's person and used it to open the car in the driveway. A narcotics dog searched the interior of the Explorer and alerted to several areas, but officers found no drugs.[3] Officers remained at the Waters Street residence for approximately two hours, to "maintain the status quo." Their protocol

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2 The validity of the Camry search is not at issue here.

3 At the evidentiary hearing on the renewed motion to suppress, Estrada testified that the dog had alerted to the exterior of the vehicle as well. As this information was not included in the warrant affidavit, we do not consider it here. We note that the United States Supreme Court recently granted certiorari in a case presenting the issue of whether a narcotics dog's warrantless "sniff test" outside a suspected marijuana grower's front door constituted an unlawful search. (See *Jardines v. State* (Fla. 2011) 73 So.3d 34, cert. granted *sub nom. Florida v. Jardines (*Jan. 6, 2012) __ U.S __ [132 S.Ct. 995, 181 L.Ed.2d 726, 2012 U.S. LEXIS 7].)

demanded that no one at the residence be allowed to make telephone calls during that time.

(iii) *Initial entry into the Marble Lane residence.*

Officers then travelled to the Marble Lane residence, which Estrada believed was a "stash house." Using a key taken from Valencia's person, Estrada and four other officers entered the residence and secured it, briefly searching to ensure no one was hiding inside and destroying evidence. This action took between three and ten minutes. No one was discovered inside. However, officers observed what they believed to be a large amount of methamphetamine in plain view in an open ice chest next to a baby's crib, and a large amount of United States currency in plain view in an open diaper box next to the ice chest, as well as scattered on the floor.

Estrada explained that he believed it was necessary to secure the residence because approximately one-half hour had elapsed between Valencia's arrest and the officers' arrival at Marble Lane. Furthermore, the driver of the Camry had also been arrested. In Valencia's experience, drug traffickers often have prearranged call systems, whereby if one of the traffickers is arrested, a coconspirator will alert other conspirators to remove any contraband from a "stash house." Estrada explained, "The call systems can range from someone not answering a phone to answering the phone. It could go either way . . . ." Prior to entering the Marble Lane residence, Estrada did not see or hear anyone inside the premises, nor did he hear any noise or "commotion" from inside the house. He had no specific information that anyone was inside the house.

(iv) *Warrant affidavit and subsequent search.*

Estrada began preparing a search warrant for the Marble Lane premises approximately 20 to 30 minutes after it was secured. It took approximately three to four hours for Estrada to prepare the warrant, have the magistrate review it, and obtain the magistrate's signature. The search warrant was signed by the magistrate at 11:57 p.m.

In addition to the information sealed pursuant to *Hobbs,* the affidavit supporting the search warrant described the following: (1) the surveillance conducted of the Olive Street and Marble Lane residences, and of Valencia's Explorer, in April and June 2009;

(2) Zagrera's placement of the item under her shirt on April 13, 2009; (3) the observation that Valencia had, on April 9, 2009, carried a weighty box into an apartment complex after leaving the Olive Street residence and engaging in counter-surveillance driving; (4) Valencia's drive to Food 4 Less, his contacts with the Camry, and the drive to the cul-de-sac; (5) the Camry occupants' actions and the discovery of methamphetamine in the Camry's center console; (6) the search of the Waters Street residence, which revealed no contraband; (7) the canine's alerts to areas inside the Explorer; and (8) the cash, scale, packaging materials, and what appeared to be methamphetamine packaged similarly to that found in the Camry, observed when officers secured the Marble Lane house. Estrada averred in the affidavit that narcotics traffickers often maintain multiple residences as a means of increasing security and avoiding discovery. Estrada believed Valencia's insistence that he resided at Waters was an attempt to distance himself from the Marble Lane residence. Estrada also explained his reasons for securing the Marble Lane residence prior to obtaining the warrant.

Officers executed the warrant immediately after the magistrate signed it. They seized approximately 4.75 pounds of methamphetamine in Ziploc baggies in the open, blue ice chest and approximately $80,000 in United States currency from the diaper box.

2. *Motions to unseal the affidavit and suppress, quash, and traverse the warrant.*

a. *Motions at or prior to the preliminary hearing*

Prior to the preliminary hearing Valencia moved to unseal the warrant affidavit in its entirety. After an in camera hearing on October 15, 2009, the magistrate ordered the warrant affidavit unsealed with the exception of one paragraph and several words or phrases, which were redacted.

Valencia also moved to quash and traverse the warrant and suppress evidence. The court denied the motion after hearing testimony at the preliminary hearing. The court found the warrantless entries into the Waters Avenue and Marble Lane residences were unlawful, but the search pursuant to the warrant was nonetheless valid under the independent source doctrine. The court declined to find that the officers purposely attempted to mislead the magistrate who issued the warrant. However, it expressed deep

concern that "the Pomona Police Department has what the court considers to be too little, if not an outright disregard, for the protections afforded by the Fourth Amendment." It then held Valencia to answer.

b. *Subsequent motions.*

After the preliminary hearing Valencia moved again to unseal the warrant in its entirety. The trial court invited the parties to submit questions to be posed to the affiant officer, reviewed the transcript of the October 15, 2009 in camera hearing, and conducted a second in camera hearing. The court ruled that the redacted paragraph should remain sealed, but the redacted phrases and words should be disclosed, as they were inconsequential. The court opined that there was no reasonable possibility nondisclosure of the information in the larger paragraph would deny Valencia a fair trial.

Thereafter Valencia challenged the validity of the searches and seizures by means of a Penal Code section 995 motion to set aside the information, and a renewed motion to suppress pursuant to Penal Code section 1538.5, subdivision (i), both filed on December 10, 2009, and a supplemental motion to suppress, filed on January 11, 2010.

On March 1, 2010, the trial court denied the motion to set aside the information, concluding that the evidence presented at the preliminary hearing was sufficient to establish probable cause to believe Valencia was guilty of the charged crimes.

On March 19, 2010, the court conducted an evidentiary hearing on the renewed motion to suppress, at which Officer Estrada testified. After thoroughly considering the record and the arguments of the parties, it denied the motion. Like the preliminary hearing judge, the court concluded that the warrantless entry into the Waters residence, the warrantless search of the Explorer, and the warrantless initial entry into the Marble Lane residence were all illegal. The court expressed its "dismay" at the officers' "either ignorance or disregard of what the Fourth Amendment requires." Nonetheless, the court concluded the warrant search was valid under the independent source doctrine.

3. *Plea and sentence.*

After denial of his suppression motions, and pursuant to a plea agreement, Valencia pleaded no contest to sale of a controlled substance, methamphetamine (Health & Saf. Code, § 11379, subd. (a)); possession of methamphetamine for sale (Health & Saf. Code, § 11378); receipt of, and attempt to conceal, proceeds derived from controlled substance offenses (Health & Saf. Code, § 11370.9, subd. (a)); and two counts of child abuse (Pen. Code, § 273a, subd. (a)). Valencia also admitted that the amount of methamphetamine possessed for sale exceeded one kilogram (Health & Saf. Code, § 11370.4, subd. (b)). The trial court sentenced Valencia to the agreed-upon term of five years in prison. It imposed a restitution fine, a suspended parole restitution fine, a court security fee, and a laboratory analysis fee. Valencia appeals.

DISCUSSION

1. *Motions to unseal, quash, and traverse search warrant.*

Pursuant to Evidence Code sections 1041 and 1042, and *Hobbs, supra,* 7 Cal.4th at page 971, all or part of a search warrant may be sealed or redacted to protect the identity of a confidential informant. (*Hobbs, supra,* at p. 971; *People v. Galland* (2008) 45 Cal.4th 354, 363-364 (*Galland*); *People v. Heslington* (2011) 195 Cal.App.4th 947, 955-956 *(Heslington)*.) "[W]hen a search warrant is valid on its face, a public entity bringing a criminal proceeding may establish the search's legality without revealing to the defendant any official information or an informant's identity. (Evid. Code, § 1042, subd. (b).)" (*Heslington, supra,* at p. 956.) To preserve a defendant's right to reasonable access to information that might form the basis for a challenge to the validity of a warrant, and to strike a fair balance between the People's right to assert the informant's privilege and the defendant's discovery rights, a trial court must follow certain procedures when a defendant moves to unseal, quash, or traverse a warrant that has been fully or partially sealed. (*Hobbs, supra,* at pp. 962, 971-975; *Galland, supra,* at p. 364; *Heslington, supra,* at pp. 956-958.)

First, the trial court should conduct an in camera hearing to determine whether there are sufficient grounds for maintaining the confidentiality of the informant's identity. If so, the court next determines to what extent sealing is necessary to avoid revealing the informant's identity. (*Galland, supra,* 45 Cal.4th at p. 364; *Hobbs, supra,* 7 Cal.4th at p. 972; *People v. Martinez* (2005) 132 Cal.App.4th 233, 240-241.) Defense counsel, who is generally excluded from this hearing, may submit written questions to be asked of any witness called to testify. (*Hobbs, supra,* at p. 973.) Because the defendant may be ignorant of critical portions of the affidavit, the court must "take it upon itself both to examine the affidavit for possible inconsistencies or insufficiencies regarding the showing of probable cause, and inform the prosecution of the materials or witnesses it requires." (*Ibid.*; *Heslington, supra,* 195 Cal.App.4th at p. 956; *People v. Martinez, supra,* at p. 241.)

Once the affidavit is found to have been properly sealed, the court must determine whether, under the totality of the circumstances there was " ' "a fair probability" that contraband or evidence of a crime would be found in the place searched pursuant to the warrant' (if the defendant has moved to quash the warrant) or 'whether the defendant's general allegations of material misrepresentations or omissions are supported by the public and sealed portions of the search warrant affidavit, including any testimony offered at the in camera hearing' (if the defendant has moved to traverse the warrant)." (*Galland, supra,* 45 Cal.4th at p. 364; *Hobbs, supra,* 7 Cal.4th at pp. 974, 975; *Heslington, supra,* 195 Cal.App.4th at p. 957.) If there is no merit to the defendant's motions to quash or traverse, the court should simply report this conclusion to the defendant and enter an order denying the motion. (*Hobbs, supra,* at p. 974; *People v. Martinez, supra,* 132 Cal.App.4th at p. 241.) We independently review the record, including the sealed documents, to determine whether the trial court's rulings constituted an abuse of discretion. (*People v. Martinez, supra,* at p. 241.)

a. *The motion to unseal the redacted paragraph of the warrant affidavit.*

We have independently reviewed the redacted and public portions of the warrant affidavit, as well as the transcript of the in camera hearing conducted on March 19, 2010.

We conclude that valid grounds existed for maintaining the informant's confidentiality. (See *Hobbs, supra,* 7 Cal.4th at p. 972.) Disclosure of the redacted portion of the affidavit would have revealed or tended to reveal the informant's identity, and therefore redaction of the paragraph was proper. (*Ibid.*; *People v. Martinez, supra,* 132 Cal.App.4th at pp. 241-242.) The trial court properly adhered to the *Hobbs* procedure.

Valencia advances a variety of arguments in support of his contention that use of the *Hobbs* procedure violated his rights. First, he urges that the *Hobbs* procedure is "[c]onstitutionally [i]nfirm." He posits that the United States Supreme Court "has not ruled on the *Hobbs* procedure," and contends its use here violated his federal constitutional rights to due process and counsel. But Valencia's argument is foreclosed by *Hobbs, supra,* 7 Cal.4th at pages 971 to 975, which expressly authorized the procedure followed by the trial court and rejected the claim that it violated the defendant's due process rights. (*Hobbs, supra,* at pp. 957- 967.) As Valencia appears to recognize, we are not at liberty to disregard *Hobbs* . (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Valencia next asserts that *Hobbs* is inapplicable to the present case. He argues that "the holding in *Hobbs* presupposes the existence of a search warrant valid on its face and, impliedly, a search based on that valid warrant. . . . Such principles have no application where the officers have first proceeded without a warrant as in the present case." Valencia cites no authority directly supporting such a rule, and the cases he cites as analogous authority (*People v. Machupa* (1994) 7 Cal.4th 614; *Parsley v. Superior Court* (1973) 9 Cal.3d 934), do not assist him; neither involved the *Hobbs* procedure. Valencia's suggestion that such a rule flows from *Hobb*'s purported "preference for warrants" is not persuasive. In support of its holding, *Hobbs* discussed the societal values underlying the need to protect the identities of confidential informants. (*Hobbs, supra,* 7 Cal.4th. at pp. 957-958.) It observed the longstanding rule that "the identity of an informant who has supplied probable cause *for the issuance of a search warrant* need not be disclosed where such disclosure is sought merely to aid in attacking probable cause." (*Id.* at p. 959, italics in original.) *Hobbs* explained the rationale behind the rule thusly:

" 'If a search is made pursuant to a warrant valid on its face and the only objection is that it was based on information given to a police officer by an unnamed informant, there is substantial protection against unlawful search and the necessity of applying the exclusionary rule in order to remove the incentive to engage in unlawful searches is not present. *The warrant, of course, is issued by a magistrate,* not by a police officer, *and will be issued only when the magistrate is satisfied by the supporting affidavit that there is probable cause.*' " (*Id*. at p. 960, italics in original.) *Hobbs* reasoned that a magistrate is empowered to require disclosure of the informant, or examine the informant in camera. The requirement that an affidavit be presented to the magistrate, and the magistrate's control over the issuance of the warrant, diminish the danger of illegal action. (*Ibid.*)

This passage does not suggest that the *Hobbs* privilege has evaporated simply because the warrant search was preceded by unlawful searches. Here, the informant's information was provided to the magistrate in support of the probable cause showing *for issuance of the warrant.* The informant's information was relevant only to the probable cause showing for the warrant; it was not offered to justify the earlier warrantless searches or the warrantless arrest. (Cf. *Hobbs, supra,* 7 Cal.4th at p. 961, fn. 3; *Cooper v. Superior Court* (1981) 118 Cal.App.3d 499, 508-509.) Just as contemplated by *Hobbs,* here the magistrate considered the informant's information and controlled the issuance of the warrant. The protections discussed in *Hobbs* were thus in effect.

Valencia next suggests *Hobbs* is inapplicable because, unlike in that case, here the magistrate did not personally examine the confidential informant at the in camera hearing. (*Hobbs, supra,* 7 Cal.4th at p. 976.) However, this distinction is immaterial; an informant is not required to testify at the in camera hearing. (*Davis v. Superior Court* (2010) 186 Cal.App.4th 1272, 1277 ["The confidential informant's presence is not required at the in camera hearing"]; *People v. Alderrou* (1987) 191 Cal.App.3d 1074, 1079 ["Neither expressly nor by implication does Evidence Code section 1042, subdivision (d) *require* the confidential informant to be present or to testify at the in camera hearing"].)

Finally, Valencia complains that because one paragraph of the four-page warrant affidavit was redacted, he was "unable to challenge the sufficiency or accuracy of the allegations in the search warrant affidavit" for purposes of analysis of the independent source doctrine. But *Hobbs* teaches that a defendant's rights are adequately protected by allowing the trial court to conduct the in camera review of the sealed affidavit. (*Hobbs, supra,* 7 Cal.4th at pp. 967-971; *Heslington, supra,* 195 Cal.App.4th at p. 956, fn. 6.) In any event, our review of the single redacted paragraph suggests that its disclosure was not essential to Valencia's ability to effectively challenge the warrant affidavit or the application of the independent source doctrine.

b. *Motion to traverse.*

A defendant moving to traverse a warrant " 'mount[s] a subfacial challenge, i.e., attack[s] the underlying veracity of statements made on the face of the search warrant application.' (*Hobbs, supra,* 7 Cal.4th at pp. 965, 974.)" (*Heslington, supra,* 195 Cal.App.4th at p. 957, fn. 7.) To prevail on a motion to traverse, the defendant must show (1) the affidavit contained a false statement made knowingly and intentionally, or with reckless disregard for the truth, and (2) the allegedly false statement was necessary to the probable cause finding. (*Hobbs, supra,* 7 Cal.4th at p. 974; *Heslington, supra,* at p. 957, fn. 7.) The court must determine whether any defense allegations of material misrepresentations or omissions are supported by the public and sealed portions of the warrant affidavit or testimony offered at the in camera hearing. (*Galland, supra,* 45 Cal.4th at p. 364; *Hobbs, supra,* at p. 974; *People v. Martinez, supra,* 132 Cal.App.4th at p. 241.)

In the warrant affidavit, Officer Estrada averred that officers secured the Marble Lane residence prior to issuance of the warrant "to prevent the destruction and/or possible loss of contraband[.]" The affidavit stated: "[I]t is unknown if the subjects involved have a call system pre-arranged to alert each other of law enforcement activity, or lack thereof. . . . It is common for traffickers to have this type of call system in place and arranged on the delivery side, customer side, and/or with co-conspirators. Also, it was possible for the female in the Camry to make a call via her cell phone, or any of the other

residents at the Waters residence." Valencia argues Estrada's representations were "blatantly false" in light of the fact that the Camry occupants and the persons at the Waters residence were being detained by police and were unable to make telephone calls.

Valencia has failed to show these statements were knowingly and intentionally false, or made with a reckless disregard for the truth. The officer stated he did not know whether the suspects in the instant case had such a call system; he did not aver one was in place, or that any calls were actually made. Estrada testified that drug traffickers sometimes alert one another to police involvement through the *failure to answer a call.* Thus, even if the persons detained by police were unable to make calls *out*, hypothetically their inability to *receive* calls, or failure to make a call, could have alerted others in the conspiracy to their arrests. Further, it is not impossible that the female occupant of the Camry could have made a quick call or sent a text message as the Camry was being pulled over; at that point she was not yet under police control, and Estrada testified that a cell phone was found in the car. Although the subjects were prevented from making outbound calls once they were arrested or detained, their failure to answer a call could have been a signal as well, as Estrada testified.

In any event, Valencia has not shown that the purportedly false statements were necessary to the probable cause finding. Both the preliminary hearing court and the trial court concluded the initial entry into the Marble Lane residence was illegal, and did not consider that entry or the observations made in the house as a basis for the probable cause finding. The motion to traverse was properly denied.

c. *Motions to quash.*

As discussed in more detail *ante*, viewing the totality of the circumstances, and excising the portions of the warrant affidavit containing illegally obtained information, the information in the warrant affidavit established a fair probability that evidence of a crime or contraband would be found at the Marble Lane premises. The motions to quash were properly denied.

2. *Motion to set aside the information and renewed motion to suppress evidence.*

a. *Scope and standard of review.*

The parties agree that Valencia is entitled to separate review of the denial of his Penal Code section 995 motion to set aside the information, and of his renewed motion to suppress brought pursuant to Penal Code section 1538.5, subdivision (i).[4] (*People v. Torres* (2010) 188 Cal.App.4th 775, 780, 784.) Each motion must be reviewed on the record as it existed when the court decided the motion. (*Id.* at p. 780.) "Thus, we will look for substantial evidence at the preliminary hearing to support the denial of the motion to set aside, i.e., that substantial evidence supported the magistrate's ruling. [Citation.] . . . [W]e will look for substantial evidence in the record of the de novo hearing" on the renewed motion to suppress, "including the [officer's] additional testimony—to support the denial of the renewed motion to suppress." (*People v. Torres, supra,* at p. 785.) Here, each motion raised the same issues and was based largely upon the same testimony, and we discuss them together where appropriate.

When reviewing a motion to suppress, we defer to and draw all presumptions in favor of the trier of fact's express or implied factual determinations, and uphold them if they are supported by substantial evidence. We exercise our independent judgment in determining whether, on such facts, the challenged search was reasonable under the Fourth Amendment. (*People v. Glaser* (1995) 11 Cal.4th 354, 362; *People v. Shafrir*

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[4] A defendant may move at the preliminary hearing to suppress evidence obtained from an allegedly illegal search or seizure. (Pen. Code, § 1538.5, subd. (f).) To preserve the issue for appeal, the defendant may renew the motion in the trial court, where he or she is entitled to a de novo hearing. (*People v. Torres, supra,* 188 Cal.App.4th at p. 783.) At that hearing the evidence is limited to the transcript of the preliminary hearing, testimony by witnesses who testified at the preliminary hearing and may be recalled by the People, and evidence that could not reasonably have been presented at the preliminary hearing. (Pen. Code, § 1538.5, subd. (i); see generally *People v. Mazurette* (2001) 24 Cal.4th 789, 798.) The defendant may also preserve a search and seizure challenge for appeal by moving to set aside the information for lack of probable cause pursuant to Penal Code section 995. (*People v. Torres, supra,* at p. 783.) As noted, here Valencia pursued both avenues.

(2010) 183 Cal.App.4th 1238, 1244-1245; *People v. Torres, supra,* 188 Cal.App.4th at p. 785; *People v. Hua* (2008) 158 Cal.App.4th 1027, 1033.) Challenges to the admissibility of a search or seizure must be evaluated solely under the Fourth Amendment, and evidence is excluded only if required by the federal Constitution. (*People v. Carter* (2005) 36 Cal.4th 1114, 1141; *People v. Camacho* (2000) 23 Cal.4th 824, 830; *People v. Chavez* (2008) 161 Cal.App.4th 1493, 1498.)

It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable. "Indeed, 'the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." ' [Citation.]" (*People v. Thompson* (2006) 38 Cal.4th 811, 817; *People v. Celis* (2004) 33 Cal.4th 667, 676; *People v. Hua, supra,* 158 Cal.App.4th at p. 1033.) The presumption of unreasonableness that attaches to a warrantless entry into the home can " 'be overcome by a showing of one of the few "specifically established and well-delineated exceptions" to the warrant requirement [citation], such as " 'hot pursuit of a fleeing felon, or imminent destruction of evidence, . . . or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling' " [citation]. The United States Supreme Court has indicated that entry into a home based on exigent circumstances requires *probable cause* to believe that the entry is justified by one of these factors . . . .' [Citation.]" (*People v. Thompson, supra,* at pp. 817-818; *People v. Celis, supra,* 33 Cal.4th at p. 676; *People v. Strider* (2009) 177 Cal.App.4th 1393, 1399-1400.) Where police conduct a search or seizure without a warrant, the prosecution has the burden of showing the officers' actions were justified by an exception to the warrant requirement. (*People v. Strider, supra,* at p. 1400.)

b. *The exigent circumstances doctrine did not justify the initial entry into the Marble Lane residence.*

The People do not challenge the lower courts' holdings that the warrantless entry into the Waters residence, and the search of the Explorer parked in the driveway at Waters, were constitutionally infirm. Accordingly, we accept that these searches were invalid.

The People do challenge the conclusion that the initial entry into the Marble Lane residence was unlawful, urging that it was justified by exigent circumstances. Probable cause, coupled with exigent circumstances, may justify a warrantless entry to secure a residence while police await issuance of a warrant. (*People v. Gentry* (1992) 7 Cal.App.4th 1255, 1261; *People v. Ortiz* (1995) 32 Cal.App.4th 286, 291; *People v. Hua, supra,* 158 Cal.App.4th at p. 1034.) Here, the only exigent circumstance identified by Officer Estrada and the People was the exception for the imminent destruction of evidence.[5] That exception applies when officers have probable cause to believe evidence of a crime is present in the home, *and* reasonably conclude the evidence will be destroyed or removed before they can secure a warrant. (*People v. Celis, supra,* 33 Cal.4th at p. 676; *People v. Camilleri* (1990) 220 Cal.App.3d 1199, 1209.) Officers " 'must have an objectively reasonable basis for believing there is someone inside the residence who has reason to destroy evidence.' " (*People v. Gentry, supra,* at p. 1264; *People v. Camilleri, supra,* at p. 1209.) Mere fear or apprehension that evidence will be destroyed, or unparticularized suspicion or hunches, do not suffice. (*People v. Duncan* (1986) 42 Cal.3d 91, 98; *People v. Gentry, supra,* at p. 1262; *People v. Koch* (1989) 209 Cal.App.3d 770, 782, disapproved on other grounds in *People v. Weiss* (1999) 20 Cal.4th 1073, 1075.) Instead, " ' "[t]here must exist 'specific and articulable facts which, taken together with rational inferences' " ' " support the warrantless intrusion. (*People v. Gentry, supra,* at p. 1262; *People v. Koch, supra,* at p. 782; *People v. Ortiz, supra,* at p. 292; *People v. Camilleri, supra,* at p. 1209.) The circumstances must be measured by the facts known to the officers at the time. (*People v. Panah* (2005) 35 Cal.4th 395, 465;

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5 Although the record sometimes refers to the initial warrantless entry into the Marble Lane property as a "protective sweep," the People do not advance this argument on appeal. Under *Maryland v. Buie* (1990) 494 U.S. 325, 327, officers may conduct a limited, brief search of premises to ensure officer safety if they have a reasonable suspicion that the area to be swept harbors an individual who poses a danger to those on the scene. (See *People v. Ormonde* (2006) 143 Cal.App.4th 282, 292; *People v. Ledesma* (2003) 106 Cal.App.4th 857, 863.) In the instant case, there was no showing or contention that officers reasonably believed a dangerous individual was in the house.

People v. Ortiz, supra, at p. 292.) In determining whether the exception applies, courts consider: (1) the degree of urgency involved and the amount of time necessary to obtain a warrant; (2) whether officers had a reasonable belief that the contraband was about to be removed; (3) the possibility of danger to officers guarding the site while waiting for issuance of a warrant; (4) information indicating the possessors of the contraband were aware police were on their trail; (5) the ready destructibility of the contraband; and (6) the officers' knowledge that narcotics traffickers typically will attempt to dispose of their contraband and escape. (*People v. Ortiz, supra*, at p. 292.) No single factor is dispositive; "the determination . . . turns upon whether, in light of all of the facts of the particular case, there was an urgent need justifying a warrantless entry." (*Id.* at p. 293.)

As discussed *ante,* Officer Estrada testified that he was afraid unknown co-conspirators in the drug-trafficking organization might have been alerted to the fact Valencia and the occupants of the Camry had been arrested and detained by police, and might go to the Marble Lane house to move the methamphetamine. Valencia argues that this concern was entirely illusory, and in fact dishonest, given that the occupants of the Camry and the residents at Waters were all detained and unable to make telephone calls. For the reasons set forth in part1.b., *ante, w*e do not view Estrada's statements as dishonest or unreasonable. The problem, however, is that Officer Estrada's concerns were purely hypothetical. There was no showing of any specific facts—as opposed to mere speculation—supporting a reasonable conclusion that anyone was actually in the house destroying evidence. No facts existed to suggest any coconspirator had observed the arrests. Valencia had driven his Explorer away by the time the Camry was stopped, and the Camry's occupants were being detained elsewhere when police arrived at the Waters residence and arrested Valencia. Estrada had no information that any phone calls had actually been placed, missed, or attempted. There was no indication anyone was in the Marble Lane house when officers arrived. The officers did not see or hear anything indicating someone was inside. There were no other indicia someone might be present, such as an open door or gate, a vehicle parked in the driveway, or similar facts. No facts suggested another member of the conspiracy was awaiting imminent delivery of the drugs

or payment, and might have been tipped off when the contact failed to arrive. (Cf. *People v. Freeny* (1974) 37 Cal.App.3d 20, 32-33.)

People v. Ortiz, supra, 32 Cal.App.4th 286, cited by the People, does not assist them. In *Ortiz*, officers were lawfully walking down a hotel hallway when they passed a partially open door to a hotel room. Through the doorway, they observed the defendant and a woman counting out foil bindles and placing them on a table. Reasonably believing the bindles contained heroin, and fearing the contraband might be destroyed absent quick action, an officer entered the room, seized the heroin, and arrested the defendant. (*Id.* at p. 289.) Viewed objectively, the facts known to the officers and the inferences to be drawn therefrom were sufficient to lead a reasonable officer to conclude there was an imminent danger the contraband would be destroyed. (*Id.* at pp. 289, 294.) Quite obviously, the facts of the instant case bear no resemblance to those in *Ortiz.* Here, officers had no reason to believe anyone was inside the Marble residence.

This case bears a greater resemblance to *People v. Gentry, supra*, 7 Cal.App.4th 1255. There, an informant told police a dealer was selling marijuana from his car, which was parked across the street from his apartment complex. While the warrant application was being prepared, officers arrested the dealer in the driveway. Other officers entered an apartment they incorrectly believed to be the dealer's, without consent. *Gentry* concluded exigent circumstances did not justify the entry. There was no evidence the dealer was operating with anyone else, no evidence the apartment was occupied, no evidence the arrest was in view of the apartment's occupants, and no evidence that anyone possibly possessing evidence could have been alerted to the presence of police. (*Id.* at p. 1263.) As in *Gentry*, here the purported exigency rested upon mere speculation and conjecture. Thus, the warrantless entry into the Marble Lane residence was not justified by exigent circumstances.

c. *Application of the independent source doctrine.*

We turn to the question of whether the warrant search of the Marble Lane residence was valid despite the preceding illegal searches and inclusion of information observed during those searches in the warrant affidavit.

The Fourth Amendment does not require suppression of evidence initially discovered during an illegal warrantless entry onto property, if the evidence is also discovered during a subsequent search pursuant to a valid warrant, that is wholly independent of the illegal entry. (*Murray v. United States* (1988) 487 U.S. 533, 537-538 (*Murray*); *People v. Weiss* (1999) 20 Cal.4th 1073, 1077 (*Weiss*).) "It has long been established that even if a criminal investigation involved some illegal conduct, courts will admit evidence derived from an 'independent source.' [Citation.]" (*Weiss, supra,* at p. 1077.) The rationale for this rule is that police officers should be put in the same, not a worse, position than they would have been in had police errors or misconduct not occurred. (*Murray, supra,* at p. 537; *Weiss, supra,* at pp. 1077-1078.) Thus, where an affidavit supporting a search warrant contains information obtained unlawfully as well as untainted information, a two-pronged test applies to determine whether the independent source doctrine applies. First, the *affidavit, excised of* any illegally obtained information, must be sufficient to establish probable cause. Second, the evidence must support a finding that "the police subjectively would have sought the warrant even without the illegal conduct." (*Weiss, supra,* at pp. 1078-1079, 1082.)[6]

(i) *Probable cause showing.*

As both the preliminary hearing court and the trial court found, here the warrant affidavit, excised of all illegally obtained information, was sufficient to establish probable cause. Probable cause is established where there is a fair probability that contraband or evidence of a crime will be found in a particular place. (*Illinois v. Gates* (1983) 462 U.S. 213, 238; *People v. Scott* (2011) 52 Cal.4th 452, 483; *People v. Kraft* (2000) 23 Cal.4th 978, 1040-1041.) " ' "The task of the issuing magistrate is simply to

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6 Valencia argues that the excised portion of the warrant "formed the 'backbone' of the probable cause showing, and must have affected the issuing magistrate's decision." To the extent Valencia intends to argue that the independent source doctrine requires a showing that the magistrate would have issued the warrant even without considering the tainted information, this contention was squarely rejected in *Weiss, supra,* 20 Cal.4th at pages 1074-1075.

make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him [or her], including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." [Citation.]' " (*People v. Scott, supra,* at p. 483.) Probable cause may be shown by evidence that would not be competent at trial, and a magistrate may reasonably rely on the special experience and expertise of the affiant officer in considering whether probable cause exists. (*People v. Varghese* (2008) 162 Cal.App.4th 1084, 1103.) Although reviewing courts normally accord great deference to a magistrate's determination of probable cause, this is not the case when police officers include tainted information in a warrant affidavit. (*Weiss, supra,* 20 Cal.4th at p. 1083.)

The *lawfully* obtained information in the warrant included the following. On four occasions between mid-April and late June 2009, officers observed Valencia engaging in what Estrada, based on his experience and training as a narcotics officer, believed to be counter-surveillance driving. On one of these occasions officers observed Zagrera obtain something from Valencia's vehicle and place it under her shirt. On another they saw Valencia carry a box into an apartment after visiting the Olive Street house. On July 22, 2009, officers observed Valencia drive to the supermarket, scan the area while speaking on the phone, move his car to another spot, make eye contact with the driver of the white Camry, leave in tandem with the Camry, and travel to a nearby cul-de-sac near the Olive Street house, via a somewhat indirect route. Although the officers did not witness a transaction between the drivers, the vehicles were out of their sight for up to three minutes, ample time for a hand-to-hand drug exchange to occur. Immediately thereafter the Explorer left and the occupants of the Camry were seen with their hands in the vehicle's center console. When the Camry was stopped, the console was found to hold approximately two pounds of methamphetamine. These facts readily gave rise to a reasonable inference that Valencia had just participated in a methamphetamine transaction. Officers reasonably believed Valencia resided at the Marble Lane residence; he and his wife or girlfriend, and their infant, had been seen there previously, and officers

had seen him use a garage door opener to the residence. Having just seen him involved in what officers reasonably believed to be a drug deal, it was likewise reasonable for them to believe evidence of narcotics trafficking would be found at Valencia's residence. The brief and unexplained meeting between the cars, the choice of the location for the stop (a cul-de-sac, from which any law enforcement officers would have been easily observed), the Camry occupants' manipulation of something in the center console, and the discovery of methamphetamine, coupled with the earlier observations of Valencia's repeated counter-surveillance driving and the information provided in the sealed portion of the affidavit, provided probable cause to believe contraband or evidence of a crime would be found at the Marble Lane residence. Thus, the untainted portions of the affidavit were sufficient to establish probable cause.

Valencia asserts that the information about the counter-surveillance driving was conclusory and stale. We disagree. Officer Estrada testified, at the preliminary hearing, to precisely what he meant by "counter[-]surveillance driving," explaining that on numerous occasions Valencia drove indirect routes, made unnecessary U-turns, drove through parking lots, stopped, and continued driving. This was sufficient; we do not believe Estrada was required to redefine the term each time he described Valencia's behavior. Nor was the information stale. "No bright-line rule defines the point at which information is considered stale. [Citation.] Rather, 'the question of staleness depends on the facts of each case.' [Citation.] 'If circumstances would justify a person of ordinary prudence to conclude that an activity had continued to the present time, then the passage of time will not render the information stale.' [Citation.] [¶] Courts have upheld warrants despite delays between evidence of criminal activity and the issuance of a warrant, when there is reason to believe that criminal activity is ongoing or that evidence of criminality remains on the premises." (*People v. Carrington* (2009) 47 Cal.4th 145, 163-164; *People v. Hulland* (2003) 110 Cal.App.4th 1646, 1652.) Such was the case here: the observations in April and June 2009, coupled with the events of July 22, 2009––which transpired only hours before the warrant was issued—suggested Valencia was involved in an ongoing drug trafficking operation.

(ii) *Estrada's motivation for seeking the warrant.*

The second prong of the independent source test requires that Officer Estrada would have sought the warrant even absent the illegal conduct, that is, absent the entry into the Waters Avenue residence, the search of the Explorer, and the initial warrantless entry into the Marble Lane residence. (See *Weiss, supra*, 20 Cal.4th at p. 1079.) As it arises here, this inquiry involves two questions: first, was there substantial evidence to support such a finding; and second, was such a finding actually made.

A. *Substantial evidence.*

In our view, there was substantial evidence on this point, both as the record stood at the preliminary hearing and after the subsequent evidentiary hearing before the trial court. At the preliminary hearing, defense counsel asked Estrada, "is the fact that you found no drugs at the Waters location, was that significant to you in terms of where you might find drugs?" Estrada answered, "No." Defense counsel further queried whether Estrada made the decision to go to the Marble Lane residence once he realized there were no drugs at Waters Avenue. Estrada replied, "No, I had that predetermined." Defense counsel elicited that no one was guarding the Marble residence while officers were at Waters. The following then transpired:

"[Defense counsel]: So you left the Marble location completely unattended as far as law enforcement was concerned until after you had completed your search of the Waters location; is that right?

"[Estrada]: That's right.

"[Defense counsel]: And then at that point your entire team, except for a few guys that were left to baby-sit the Waters location, went over to Marble with an intention at that point of entering Marble; is that right?

"[Estrada]: *To write a search warrant, yes.*

"[Defense counsel]: But you didn't start writing the search warrant until after you had entered the Marble location, correct? . . .

"[Estrada]: Correct. To secure the location." (Italics added.)

At the evidentiary hearing held on the renewed motion to suppress, Estrada more clearly, and repeatedly, testified that his decision to obtain a warrant was not prompted by what he observed during the warrantless entry into Marble, the search of the Explorer, or the search at Waters. Estrada testified he formed the intention to obtain a warrant for the Marble Lane residence "[i]mmediately, when [he] believed the transaction" on Angela Street occurred; that he had decided to obtain a warrant prior to observing the methamphetamine and cash in the Marble Lane house during the warrantless entry; that he took the key to the Marble Lane house from Valencia because he was going to seek a search warrant and believed use of the key would cause less damage than breaking down the door; and that he went to Waters to secure the house for a warrant.

Certainly, the testimony at the renewed suppression hearing provided an ample evidentiary basis for the court's finding Estrada determined to write the warrant prior to any of the unlawful searches. But Estrada's testimony at the preliminary hearing was also sufficient. Albeit brief, Estrada's preliminary hearing testimony was clear: he had determined to write the warrant before he went to the Marble Lane location, and the absence of drugs at the Waters house did not factor into that decision. There was thus substantial evidence on this point both at the time the court denied the Penal Code section 995 motion, and when it subsequently denied the suppression motion.

Valencia points to language in *Murray* that an officer's assurances that he or she would have sought a warrant regardless of the illegally observed information are not dispositive, and "Where the facts render those assurances implausible, the independent source doctrine will not apply." (*Murray, supra,* 487 U.S. at p. 540, fn. 2.) He argues that here, "the known facts render implausible as a matter of law, the notion that an actual decision to get a warrant had been made prior to any of the antecedent illegalities." We disagree. While arguments as to the officer's credibility can be made both ways, nothing in the record establishes that the officer's testimony was unbelievable as a matter of law. Credibility questions were for the trial court, not this court.

B. *Absence of ruling by the preliminary hearing court.*

Valencia urges that, even if the evidence is sufficient, the preliminary hearing judge erred by failing to make an express finding on the second prong of the independent source doctrine, that is, the question of whether Estrada would have sought the warrant absent the illegal conduct. We agree that the preliminary hearing court's ruling on this issue was oblique. When ruling, the court referenced the independent source doctrine and made a clear finding that probable cause remained after the illegal observations were excised from the warrant affidavit. The court did not follow that with an express ruling on the second prong, however. The prosecutor did not bring the omission to the court's attention. Defense counsel queried, "the court has not addressed the question of whether or not the exploitation of the prior illegal searches was such that independent sources is not appropriate, or the officers' apparent incentive to go to Marble and enter it was generated by anything they had seen before. Or that their decision to get a warrant, rather, after they'd been at Marble, how much that was affected by their entry into Marble." The court replied: "With respect to the second question that you have posed, the court is not going to speculate as to what prompted the police to first unlawfully search the Waters address and then subsequently search the Marble Lane address. [¶] I do find that I do not consider the Marble Lane search to . . . have stemmed solely from the unsuccessful, unlawful search of the Waters address."

Usually, we would not hesitate to find the court made an implied finding on the issue. In reviewing the denial of a motion to suppress, an appellate court defers to the trial court's *implied* findings of fact that are supported by substantial evidence, as well as its express findings. (See, e.g., *People v. Davis* (2005) 36 Cal.4th 510, 528-529; *People v. Strider, supra*, 177 Cal.App.4th at p. 1398; *People v. Middleton* (2005) 131 Cal.App.4th 732, 737.) "If factual findings are unclear, the appellate court must infer 'a finding of fact favorable to the prevailing party on each ground or theory underlying the motion.' [Citation.]" (*People v. Middleton*, *supra*, at p. 738.) In light of the arguments made by the parties below, the preliminary hearing court's finding that the search of the Marble Lane residence did not stem solely from the searches at the Waters residence

suggests that the court concluded Estrada's decision to seek the warrant was not prompted by his observations during the illegal searches.

In *Murray*, however, the United States Supreme Court found remand appropriate where a district court had failed to make an express finding on the second prong of the independent source test. (*Murray, supra,* 487 U.S. at pp. 543-544.) There, federal agents had made an unlawful entry into a warehouse, where they observed marijuana; they subsequently obtained a warrant to search the warehouse, based entirely on information independent of the unlawful entry. The high court held that, because the agents had learned of the marijuana through both lawful and unlawful means, the independent source doctrine applied. (*Id.* at p. 541.) However, the federal district court did not explicitly find that the agents would have sought the warrant if they had not first made the illegal entry into the warehouse. Accordingly, *Murray* remanded the matter to the district court for such a determination. (*Id.* at pp. 543-544.) The high court observed that it was "the function of the District Court rather than the Court of Appeals to determine the facts, and we do not think the Court of Appeals' conclusions are supported by adequate findings." (*Id.* at p. 543.)

Assuming arguendo that *Murray* requires an express, rather than an implied, finding[7] as an element of the independent source doctrine, neither suppression nor remand is required in the instant case. Certainly, *Murray* does not suggest that the absence of such an explicit finding requires suppression; the most that might be necessary is remand for a factual finding. But here, unlike in *Murray*, remand is unnecessary

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[7] In *Weiss*, the California Supreme Court rejected the view that the independent source doctrine requires a third element, that is, that the tainted information did not affect the *magistrate's* decision to issue the warrant. (*Weiss, supra,* 20 Cal.4th at pp. 1074-1075, 1081.) *Weiss* concluded: "*Murray* did not change the long-standing rule that the reviewing court must excise all tainted information but then must uphold the warrant if the remaining information establishes probable cause." (*Id.* at p. 1081.) In dicta, however, *Weiss* mused that *Murray* "certainly seems to require a finding that the police subjectively would have sought the warrant even without the illegal conduct[.]" (*Id.* at p. 1079.)

because the *trial court* made express findings on both prongs of the independent source doctrine when it ruled on Valencia's renewed motion to suppress. In considering that motion, the trial court considered the transcript of the preliminary hearing and heard live testimony from Officer Estrada. The trial court and the parties recognized that the preliminary hearing judge had failed to make an express ruling on the second prong; as the trial court explained, "that's why we had further testimony and further argument on that." In a lengthy and thorough ruling, the trial court credited Estrada's testimony that he had decided to seek the warrant after the suspected drug transaction transpired in the cul-de-sac, opining, "I do not think he's lying."

Thus, the initial error was cured by the trial court's ruling on the renewed motion to suppress, making remand unnecessary. (See *People v. Mardian* (1975) 47 Cal.App.3d 16, 37 ["Any errors made by a magistrate at a preliminary hearing in failing to fully consider a defendant's motion to suppress evidence may be *cured* by a subsequent, correct determination of the issue in the superior court"], disapproved on another point by *People v. Anderson* (1987) 43 Cal.3d 1104, 1123 & fn. 1.) Further, given that the suppression motion and the independent source issue—the bases upon which the Penal Code section 995 motion were premised—was fully litigated and ruled upon by the trier of fact in the renewed motion to suppress, Valencia has failed to show any prejudice arising from the preliminary hearing court's inexplicit ruling. (See *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529 [prejudice required to reverse for preliminary hearing irregularities]; *People v. Standish* (2006) 38 Cal.4th 858, 883, 885.)

Valencia points to language in *People v. Torres*, *supra*, 188 Cal.App.4th 775, suggesting that a correct ruling on a renewed motion to suppress may not always cure error in a prior ruling on a motion to set aside; "an error in the ruling on the motion to set aside may persist to taint the ruling on the renewed motion." (*Id.* at p. 790, fn. 4.) In *Torres*, for example, the magistrate's error was held not to have been cured because the superior court's ruling was "likewise incorrect." (*Ibid.*) Here, in contrast, the only error––the failure to make an explicit finding—was cured by the trial court's explicit finding. No error persisted to taint the ruling on the renewed motion.

3. *Allegations of egregious police conduct.*

Valencia asserts throughout his briefing that the officers' misconduct in the instant matter was so egregious that the independent source doctrine cannot or should not apply. He avers that the exclusionary rule must be imposed in order to deter similar police misconduct. He urges that the police made three warrantless searches, detained the occupants of the Waters house for hours—conduct which purportedly caused Zagrera to suffer chest pains—and handcuffed a 16-year-old boy who was at the Waters house. He contends that the officers purposely exploited the unlawful searches in order to obtain the warrant. Under these circumstances, he argues, application of the independent source doctrine would eviscerate the Fourth Amendment's protections.

While we certainly do not condone the officers' conduct, we reject Valencia's contention. Valencia cites no authority persuading us that the independent source doctrine necessarily ceases to apply when the police engage in unlawful activity.[8] To the

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[8] *People v. Rodriguez* (2006) 143 Cal.App.4th 1137, cited by Valencia, does not hold that the independent source doctrine is generally inapplicable when police commit misconduct. There, officers allegedly invented the basis for a traffic stop. After running a records check on the motorist, they learned that there was an outstanding warrant for his arrest. They took him into custody and discovered methamphetamine in his vehicle. The *Rodriguez* majority reasoned: "The subsequent discovery of lawful grounds to arrest and search defendant does not dissipate the taint of such a flagrant violation of defendant's constitutional rights and society's necessary trust in its law enforcement officials. Nor is this violation, if it occurred, one for which the suppression of evidence is too drastic a remedy. Quite the opposite is true. Failing to invoke the most drastic remedy available to a court would have the effect of legitimizing deceitful conduct on the part of the police and permitting them to conduct a traffic stop for any reason or no reason at all in contravention of leading United States and California Supreme Court opinions." (*Id.* at p. 1141.) In sharp contrast to *Rodriguez*, there is no showing that the officers in the instant case invented evidence. *U.S. v. Madrid* (8th Cir. 1998) 152 F.3d 1034, likewise does not assist Valencia. There, when securing the defendant's house prior to issuance of a warrant, officers exploited the situation by, inter alia, detaining and searching the occupants, seizing their wallets, and leafing through personal mail and a notebook. (*Id.* at p. 1040.) In contrast, when securing the Marble Lane residence the officers did not exploit the situation, but did a quick sweep of the house and left the plain-view evidence undisturbed. Moreover, in *Madrid* the court expressed concern that probable cause for issuance of a warrant was lacking, unlike the situation here. The remaining federal

contrary, by definition the doctrine only comes into play when officers have engaged in some conduct that violates the Fourth Amendment. Application of the independent source doctrine here balances the interests of society in deterring police misconduct and obtaining all relevant evidence. As *Murray* explained: " '[T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred. . . . When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.' [Citation.]" (*Murray, supra,* 487 U.S. at p. 537.)

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authorities Valencia cites are factually distinguishable, and most do not address the independent source doctrine. In any event, we are not bound by the rulings of the lower federal courts. (*People v. Gray* (2005) 37 Cal.4th 168, 226; *People v. Weeks* (2008) 165 Cal.App.4th 882, 888.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.